adapted to all wireless services. Given this extensive experience and familiarity with cellular interconnection issues, the imposition of tariffing obligations on LECs is not necessary.[45]

### B. The Costs And Burdens Of Imposing Tariff Obligations On LECs Far Outweigh Any Benefits.

Tarrifing obligations also impose significant costs and burdens, which should be avoided in the dynamic and rapidly evolving CMRS industry.[46] The tariff process is resource-intensive and expensive. In the absence of generalized benefits, these costs are dead weight losses. Resources are directed from surplus-producing activity, most particularly from investing in new technologies and network upgrades that could benefit both consumers and CMRS providers. The costs associated with the tariffing process inevitably will be borne by wireless services consumers in the form of higher rates.[47]

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[45] The Commission should reject MCI's suggestion that CMRS interconnection to the public switched network be purchased under the LEC expanded interconnection tariffs. See Notice at para. 117. The switched access and special access expanded interconnection tariffs include rate elements, points of entry and other terms and conditions that cannot readily be modified to accommodate LEC interconnection with wireless services.

[46] See Notice at para. 110 ("In the CMRS Proceeding, commenters expressed dissatisfaction with the current system of good faith negotiations, yet few embraced tariffing as the solution".).

[47] The Commission appears to be worried that new entrants might lack the bargaining power to secure fair and reasonable interconnection agreements through the negotiations process. Notice at para. 118. The results of the nationwide narrowband PCS auctions, which raised over $617,000,000, should dispel any such concerns. See Public Notice, Mimeo 44177, dated August 21, 1994. In an era of spectrum auctions, wireless service providers

Many of the same reasons that supported the Commission's decision to forbear from applying interstate tariff requirements to CMRS providers apply in this case.

> [R]equiring tariff filings can . . . take away a carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings . . . and impose costs on carriers that attempt to make new offerings. Second, tariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level. . . . Tariffing, with its attendant filing and reporting requirements, [also] imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition.[48]

Thus, for these reasons as well the Commission should refrain from imposing tariffing requirements on the LECs.

### C. Existing Commission Procedures Are Available To Remedy Any Limited Instances Where Interconnection Is Necessary To Further Social Welfare.

There are a variety of regulatory devices available to police LEC discriminatory interconnection practices, of which the tariffing process is one. However, in a serious dispute, the value of the tariff process is impaired by the Papago doctrine which holds that an agency's acceptance of a tariff filing is not

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will be well-financed entities that are sophisticated, knowledgeable, and well-equipped to deal with their vendors, including the LECs on interconnection issues. Worries that LECs could succeed in evading their obligations under the Communications Act to provide reasonably priced non-discriminatory access to CMRS providers seem quite excessive.

48 CMRS Second Report, 9 FCC Rcd at 1479.

a final agency action and therefore not appealable.[49] The inherent weakness arising from the lack of finality in the tariff process makes other FCC remedial measures attractive solutions in interconnection disputes.

For example, the Section 208 complaint process and alternative dispute resolution procedures can sufficiently protect CMRS providers against unreasonable discrimination practices by the LECs.[50] Any aggrieved CMRS provider may file a formal complaint under Section 208 of the Communications Act with the Commission. Because the LEC is in exclusive possession of cost and other information related to its interconnection services, the burden should be on the LEC to come forward with evidence that its actions are reasonable under the Communications Act.[51]

Through this process, the Commission can ensure that CMRS providers obtain timely and appropriate redress. Under Sections 206, 207 and 209 of the Communications Act, LECs are liable for monetary damages to any CMRS provider aggrieved by a violation of the Communications Act. Furthermore, the Commission has

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49 See Papago Tribal Util. Auth. v. FERC, 628 F.2d 235 (D.C. Cir. 1980); see also Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234 (D.C. Cir. 1981).

50 47 U.S.C. § 208. The Commission's confidence in the complaint process is echoed in the CMRS Second Report, where the Commission concluded, in the context of forbearing from enforcing sections of Title II, that "the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act." CMRS Second Report, 9 FCC Rcd at 1479.

51 See Declaratory Ruling, 2 FCC Rcd at 2914.

authority to take other actions, including sanctions as drastic as revocation of a LEC cellular license, for violations of or a failure to comply with any Commission requirement or rule.[52]

Alternative dispute resolution procedures are also effective in resolving interconnection disagreements because they can expedite the resolution of any interconnection disagreements and help ensure that the negotiation process works smoothly.[53] CTIA supports continued Commission involvement and participation in interconnection matters. Designating Commission representatives to work with the parties to mediate any interconnection disputes should be effective in ensuring that such disagreements are settled in a fair, expeditious, and consistent manner.

## IV. INTERCONNECTION OBLIGATIONS SHOULD NOT BE IMPOSED ON CMRS PROVIDERS.

By virtue of the LECs' obligation to interconnect with CMRS companies, CMRS providers will be interconnected with each other, even if only indirectly so via a LEC.[54] The relevant inquiry then becomes to what extent the market needs government intervention in the form of imposing a duty to deal -- that is,

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[52] 47 U.S.C. § 312(a)(4).

[53] See Use of Alternative Dispute Resolution Procedures in Commission Proceedings in Which the Commission Is a Party, 6 FCC Rcd 5669, 5670 (1991) (The use of alternative dispute resolution techniques are "an effective tool for dealing with conflict, while avoiding the expense and delay of adversarial proceedings").

[54] The one exception to this would be a CMRS firm that, for reasons of its own, decides it does not want to interconnect with the landline network. It seems unlikely that this would occur frequently if at all.

direct CMRS to CMRS interconnection. In determining whether to impose interconnection obligations on CMRS providers, the Commission should be guided by the principle that such requirements are only necessary in those markets where a firm possesses persistent, sustained market power.[55]

In a competitive market, such as CMRS, consumer demand and business necessity will dictate the extent of and need for interconnection. Because commercial mobile services are operating in a competitive environment, there is no need to impose interconnection requirements on them. In fact, the imposition of a duty to deal in a competitive market may actually impede competition. And, given the non-trivial expense involved to establish compatibility by upgrading software, switches, and other network equipment, such requirements would be contrary to the public interest.[56]

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[55] <u>See</u> pages 15-17.

[56] CTIA is in full accord with Commissioner Barrett's statement in this proceeding:

> My goal in this area, is not to impose more regulation on non-BOC entities, in order to ensure that the cost and burden of MFJ restrictions are applied across the board in the CMRS area. Rather, I believe the Commission's goal should be to develop a transition plan away from MFJ restrictions in the wireless area, and bring everyone into relative parity based on the evolution of full competition in the PCS market. Where interconnection obligations with bottleneck BOC LEC facilities are important, I believe the Commission should impose the appropriate regulatory remedy to address this matter. Where there is no issue of interconnection to bottleneck facilities for transport and switching, then I believe there is a higher burden to justify such regulatory requirements between CMRS providers, and between resellers and CMRS providers

## A. Interstate Interconnection Requirements Are Not Necessary In The Competitive CMRS Market.

The CMRS marketplace comprises diverse services all of which operate in a competitive and rapidly changing environment. Currently, cellular, paging, and specialized mobile radio services compete in the mobile services market, and emerging services such as ESMR, satellite mobile services, and PCS are expected to provide additional competitive options. The Commission recognized as much when it found that CMRS service providers generally lack market power.[57] Such a competitive and dynamic market is exactly the kind in which a duty to deal should not be imposed.

Given the Commission's conclusion that CMRS providers lack persistent, sustained market power or control over essential bottleneck facilities,[58] it is very unlikely that such providers will indeed have the ability to engage in unreasonable or discriminatory activities. Absent such prerequisite market power or control over essential facilities, CMRS providers should not be obligated to provide interconnection to one another; rather,

under Title II.

Notice, Separate Statement of Commissioner Andrew C. Barrett.

[57] CMRS Second Report, 9 FCC Rcd at 1467. The Commission acknowledged that cellular services were sufficiently competitive to justify forbearance from Title II regulation. Id. at 1467-1468.

[58] CMRS Second Report, 9 FCC Rcd at 1499.

they should be free to negotiate direct interconnection arrangements if they so choose.[59]

In the CMRS Second Report, the Commission questioned the efficacy of "encourag[ing] a situation where most commercial traffic must go through a LEC in order for a subscriber to send a message to a subscriber of another commercial mobile radio service."[60] This concern, however, does not adequately account for the fact that interconnection with the public switched network may be, in many instances, the most efficient form of interconnection. The Commission should not adopt rules or regulations that would thwart or impede the realization of these efficiencies.[61]

Notably, if all CMRS providers are interconnected with a LEC they, and their customers, will have access to all carrier networks. As a result, direct connection of CMRS networks should be established only when such interconnection is more efficient than paying the LEC for transport and switching functions. This direct interconnection will evolve naturally as firms recognize a

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[59] To the extent problems arise in the negotiation process, the complaint procedures in Section 208 of the Communications Act, 47 U.S.C. § 208, are available to any CMRS provider alleging a violation of the Commission's rules.

[60] CMRS Second Report, 9 FCC Rcd at 1499.

[61] Of course, the ability of CMRS providers to be a viable alternative to the LEC depends on a variety of factors. One factor is the cost to CMRS providers of interconnecting with the LEC. To foster local exchange competition, the Commission must ensure that interconnection charges are not unjust or unreasonable, or are used as a means to thwart competition with CMRS providers.

tangible business need for a direct link. For example, where there are areas of high volume traffic, establishing a direct link will be more efficient that transiting an intermediary's facility. But in situations where there are low volumes of traffic, similar to traffic going to and from BOC access tandems, it will not be economically efficient to establish CMRS to CMRS direct links.[62]

Because the marketplace in the form of wireless carriers' self interest will determine when direct interconnection is most efficient, imposing interconnection obligations on CMRS providers would not only be unnecessary but such intervention could artificially skew marketplace outcomes. Accordingly, direct interconnection arrangements should be accomplished through voluntary negotiated agreements not by regulatory fiat.

This concept of voluntarily-negotiated direct interconnection is consistent with Commission precedent. In the past, the Commission has generally ordered interconnection only in those instances where it perceived market failure. For example, in the Expanded Interconnection proceeding, the

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[62] This concept is parallel to the airline industry's use of the hub and spoke method of flight connection or the railroad industry's freight classification yards method of routing rail traffic. In international communications, the Commission has recognized the utility of a flexible approach to indirect traffic routing through an intermediate, third country as a way to promote entry for new providers and as an efficient approach in those instances where traffic flow is insufficient to warrant the establishment of direct route. International communications; uniform settlement policy for parallel routes, 59 Rad. Reg. 2d (P&F) 983 (1986); Implementation and Scope of International Settlements Policy for Parallel International Communications Routes, 2 FCC Rcd 1118 (1987).

Commission found that the "LECs' current special access tariffs [made] it economically infeasible for customers to combine their own or competitive access provider facilities with portions of the LEC network to satisfy their . . . access needs."[63] The Commission's expanded interconnection policies were thus designed to eliminate inefficiencies in the marketplace, therefore making it "possible to buy only those LEC transmission and distribution [links] that a customer wants, and to combine those links with the services of a competitor."[64] To remove such barriers to competition, the Commission required Tier 1 LECs to provide interconnection to all interested parties at various LEC locations, including central offices, serving wire centers, tandem switches, and certain remote nodes.[65] CTIA respectfully submits that competitive conditions within the commercial mobile services marketplace warrant against this type of regulatory intervention.

CTIA is aware of only one instance where the Commission required carriers lacking market power to interconnect with one another, and that case is readily distinguishable from the situation here. In 1979, the Commission required international record carriers ("IRCs") providing international telex service

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[63] See Expanded Interconnection Special Access Order, 7 FCC Rcd at 7370.

[64] Remand Order, FCC 94-190, at para. 9 (released July 25, 1994).

[65] See Expanded Interconnection Switched Access Order, 8 FCC Rcd 7374 (1993).

between the United States and various overseas points to interconnect with other IRC networks upon demand.[66] In so doing, the Commission concluded that the prevailing industry arrangements, whereby IRCs did not offer telex service to the same points and no one IRC offered service to all points accessible by telex, denied subscribers access to all overseas points and thus significantly impaired the usefulness of telex service.[67] In requiring interconnection of IRC networks upon demand, the Commission sought to encourage "carriers to weigh the costs of interconnection against the costs of providing duplicate facilities."[68]

The interconnection issues raised in the Telex Order are readily distinguishable from CMRS interconnection issues. First, because each CMRS provider, by definition, is interconnected with the public switched network, effective interconnection between

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[66] Interface of the International Telex Service With The Domestic Telex and TWX Services, Docket No. 21005, 76 FCC 2d 61 (1980) ("Telex Order"). Telex service within the United States was offered solely by Western Union. Western Union also provided its subscribers access to overseas points through interconnection with all of the IRCs. However, Western Union customers did not have access to IRC subscribers, that is, Western Union subscribers could not use their terminal to communicate with other telex users. And, since IRCs were not authorized to provide service between two domestic points, IRC subscribers could not use their IRC terminals to communicate with other IRC subscribers or with Western Union subscribers.

[67] See Interface of the International Telex Service With The Domestic Telex And TWX Services, Docket No. 21005, 62 FCC 2d 414 (1976) ("Telex Notice"). Contributing to this problem was also the fact that the international component of telex service was characterized by few carriers and restricted entry. Telex Order, 76 FCC 2d at 66.

[68] Telex Order, 76 FCC 2d at 67.

CMRS providers already exists. Thus, unlike the IRCs which could not offer their customers access to all overseas points, CMRS carriers, and their customers, have access to all CMRS networks. Second, by requiring that LECs provide interconnection to all CMRS networks, an incentive exists for CMRS providers to weigh the costs of such interconnection against the costs of direct connection with other CMRS providers. Third, in the Telex Order, IRC-to-IRC was not found to be "unduly difficult or expensive to accomplish."[69] By contrast, many CMRS networks have not yet been designed, making it infeasible confidently to mandate direct interconnection at this time. For example, no wholly trustworthy estimate of the costs that would be incurred in providing direct interconnection services to other CMRS providers can be made until broadband PCS firms have been licensed and commence operations.

### B. The Costs Of Mandatory CMRS Interconnection Substantially Outweigh Any Presently Discernable Benefits.

Although the magnitude cannot be ascertained today, CMRS providers will incur substantial costs if they are required to interconnect with one another. These costs could be detrimental to consumer welfare because in many cases, as explained above, such arrangements may not be the most efficient network solution. Further, the added costs of mandated interconnection will most certainly delay or deny the public the benefit of new services.

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[69] Id. at 74-75.

Unnecessary regulation may also serve to undercut the competitive process and thereby create inefficiency and diminish consumer welfare, for example, by creating a "free riding" problem and allowing others to bear and assume the risk of establishing new networks.[70] These drawbacks are particularly significant given the goal of the NII to create a variety of networks that in turn are "networked," thereby allowing consumers access to a wide variety of information. A compulsory interconnection scheme may, in fact, reduce the incentives to build such networks, and in turn, reduce consumer choice.

In addition to efficiency and competitive concerns, articulation of specific interconnection requirements for CMRS networks presently is not feasible because the networks have yet to be designed. At this early stage of development, it is not clear what interconnection needs CMRS will have. Innovation and technological advances should not be curbed by the premature adoption of technical standards and parameters for interconnection. Furthermore, because each category of commercial mobile service has a unique network, and potentially different technological requirements, significant costs may have

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[70] See Donald I. Baker, Compelling Access to Network Joint Ventures, REGULATION, at pp. 59-60, 1994 ("Baker"). The Department of Justice has recognized in the context of automated clearinghouses that "the major difficulty with mandatory sharing is that it undercuts in advance any incentive to innovate, creating a 'free-rider' problem with respect to initial risk-taking." Antitrust Div., U.S. Dept. of Justice, Policy Statement on Sharing for the Nat'l Commission on Electronic Funds Transfers 4 (Jan. 13, 1977), quoted in Blumenthal, Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as Illustration, 58 Antitrust L.J. 855, 868 (1990).

to be incurred to upgrade software and switches and to develop new equipment, such as protocol converters, to achieve compatibility among these networks. In this regard, the industry is addressing technical standards issues and looking for ways to increase network compatibility in response to consumer demand for "seamless" service.

## V. THE COMMISSION SHOULD IMPOSE RESALE OBLIGATIONS ON CMRS PROVIDERS TO THE SAME EXTENT THAT SUCH OBLIGATIONS ARE IMPOSED ON CELLULAR LICENSEES.

In addition to seeking comment on the interconnection obligations of CMRS providers, the Notice asks parties to address whether the resale obligations imposed upon cellular licensees should also apply to CMRS providers. If so, the Commission asks whether its current cellular policy limiting facilities-based competitors mandatory right to resale to five years should be applied to CMRS providers as well.[71]

Revised Section 332, the provision governing the regulatory treatment of all CMRS providers, is the product of a congressional determination to introduce "regulatory parity" among the mobile services. Congress amended Section 332(c) to ensure that "services that provide equivalent mobile services are regulated in the same manner."[72] Thus, it established "uniform rules" to govern all commercial mobile service offerings and directed "the Commission to review its rules and regulations to

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[71] Notice at paras. 137-141.

[72] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259 (1993).

achieve regulatory parity among services that are substantially similar."[73] Consistent with Congressional intent, the Commission, in its continued adherence to Section 332, must ensure that similar services are treated alike. Imposing resale obligations on CMRS providers to the same extent as cellular carriers is a critical step in fulfilling this objective.

CTIA also requests that the Commission clarify that its cellular carrier resale rules merely require that carriers cannot discriminate in the rates they charge resellers and do not require carriers to offer bulk rates to resellers. Recently, the Common Carrier Bureau, in ruling on a complaint over the terms and conditions for the resale of cellular service, cited a statement from its Cellular Resale Notice that:

> facilities-based carriers offering a bulk rate to certain customers must make that bulk rate available to resellers on the same terms and conditions as made available to similarly situated customers.[74]

CTIA is concerned that such language will be misconstrued to suggest an additional obligation on carriers to provide special wholesale rates for resale. The Commission's cellular resale policies, however, do not grant such a right. CTIA therefore requests that the Commission clarify that cellular carriers do not have an obligation to offer bulk discounts to resellers.

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[73] Id.

[74] Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership, File No. E-91-95, DA 94-766 at n. 52 (released July 8, 1994), citing Petition for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, CC Docket No. 91-33, 6 FCC Rcd 1719, 1725 (1991).

**CONCLUSION**

For these reasons, CTIA respectfully requests that the Commission refrain from imposing equal access and interconnection obligations upon cellular and other CMRS providers, that the Commission adopt a system of good faith negotiations governing LEC provision of interconnection services to CMRS providers, and that it expand the cellular resale obligations to all CMRS providers.

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September 12, 1994

## CERTIFICATE OF SERVICE

In reference to the above-captioned filing, I hereby certify that, on September 12, 1994, copies of the Comments of The Cellular Telecommunications Industry Association, were served by hand delivery to the following:

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